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INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

September 19, 2007

Honorable Steven Kaplan, Secretary
Department of Banking
17 North Second Street
13th Floor
Harrisburg, PA 17101

Re: Regulation #3-43 (IRRC #2620)
Department of Banking
Proper Conduct of Lending and Brokering in the Mortgage Loan Business

Dear Secretary Kaplan:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at www.irrc.state.pa.us. If you would like to discuss them, please contact me.

Sincerely,

Kim Kaufman
Executive Director

wbg

Enclosure

cc: Honorable Donald C. White, Chairman, Senate Banking and Insurance Committee
Honorable Michael J. Stack, III, Minority Chairman, Senate Banking and Insurance Committee
Honorable Peter J. Daley, II, Majority Chairman, House Commerce Committee
Honorable Dick L. Hess, Minority Chairman, House Commerce Committee

Comments of the Independent Regulatory Review Commission

on

Department of Banking Regulation #3-43 (IRRC #2620)

Proper Conduct of Lending and Brokering in the Mortgage Loan Business

September 19, 2007

We submit for your consideration the following comments on the proposed rulemaking published in the July 21, 2007 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Department of Banking (Department) to respond to all comments received from us or any other source.

1. General. – Consistency with federal case law; Reasonableness.

Watters v. Wachovia

Commentators have questioned whether this regulation includes wholly owned operating subsidiaries of national banks under the definitions of “Licensee.” They cite the Watters v. Wachovia United States Supreme Court case (U.S., 127 S.Ct. 1559, 167 L.Ed.2d 389 (2007)) to support the position that these entities should not be included.

The Department has acknowledged that these entities fall under the proposed definition of “Licensee.” However, it has also acknowledged that there are circumstances where regulation of wholly owned operating subsidiaries of national banks is preempted by federal law, as discussed in the Watters decision. Therefore, it does not intend to enforce the regulations against entities that demonstrate they are wholly owned subsidiaries of national banks.

In light of the Watters decision and to avoid any potential confusion by licensees, the Department should add a provision to the definition of “Licensee” that specifically exempts wholly owned operating subsidiaries of national banks.

Applicants with limited English proficiency

The Preamble of this regulation states that because of the “complexity and competitiveness” of the mortgage industry, “borrowers may not understand the loan products offered to them or the process of obtaining a loan.” However, “complexity and competitiveness” of the loan industry may not be the only barrier to applicants understanding loans and loan products.

Several commentators have asserted that this proposed regulation could be strengthened by adding provisions to give certain rights to applicants that have a limited proficiency in the English language. Therefore, the Department should consider adding provisions to ensure that applicants with limited English proficiency can obtain documents in a language that they can read and comprehend.

2. Section 46.1. Definitions. – Reasonableness; Clarity.

The definition of “Application” contains an inaccurate citation. The correct citation is 24 CFR 3500.2(b).

Also, commentators have made various suggestions about the types of loans that should be included under the definition of “Loan.” How did the Department determine which kinds of loans would be included under this definition in the proposed regulation? Why did it not choose to include “covered” loans under that definition?

3. Section 46.2. Proper conduct of lending and brokering in the mortgage loan business. – Fiscal Impact; Reasonableness; Clarity.

Subsection (b)

Under this subsection, a licensee that has contact with the applicant must disclose certain information to the applicant within 3 business days. If both the lender and the broker are licensees, which one is required to issue the disclosure? Also, the language in this subsection is not clear as to when the 3-day period begins. The final-form regulation should be amended to clarify these points.

Subsections (e) and (f)

Numerous commentators have expressed concern that certain provisions in these subsections will eliminate their ability to offer “stated income,” “no-doc,” “low-doc,” “reverse,” and “balloon” mortgages. These commentators claim that certain applicants, such as senior citizens or self-employed individuals who cannot provide a W-2 to prove income, could be severely restricted or even prohibited from obtaining a mortgage. One commentator further asserts that Pennsylvania licensees will be put at a distinct disadvantage because national banks could continue to offer these products to consumers because they are not covered by the Department’s regulations.

The Department has indicated that it does, indeed, intend for the provisions of this regulation to eliminate any mortgage that does not verify the income and fixed expenses of the applicant.

We have several questions. How will people who do not have traditional methods for proving income obtain mortgages? How will Pennsylvania licensees be able to remain competitive with national banks that could continue to offer these products? Should a qualified consumer be prohibited from using a “low-doc” or “no-doc” loan if they choose these products based upon convenience? The Department should further explain the impact of eliminating these types of loan products.

Further, the Department has also indicated that it does not intend to prohibit “reverse mortgages.” Therefore, the final-form regulation should be amended to clearly state the Department’s intent with regard to these types of mortgages.

Subsection (e)(1)

Commentators assert that this subsection should prohibit a licensee from offering a loan without determining that the applicant will have the ability to repay the loan, including taxes and insurance, based on the **maximum** possible rate and payment which could apply under the terms of the loan. We agree. The Department should consider amending this section to ensure that the maximum possible payment is considered when doing the ability to repay assessment.

Subsection (e)(2) and (3)

The term "fixed expenses" is found in these subsections, but it is not defined in the regulation. What constitutes a "fixed expense"?

Subsection (e)(3)

This subsection allows a licensee to "consider and document information in addition to verified income and fixed expenses" when determining the applicant's ability to repay the loan. What additional information might be considered?

Subsection (e)(6)

This subsection states that the licensee must "not ignore facts or circumstances that it knows or reasonably should know which would indicate that an applicant does not have the ability to repay the offered loan." After considering the applicant's income and fixed expenses, what other "facts or circumstances" should be considered? These should be contained in the final-form regulation.

Subsection (e)(7)

In determining whether an applicant has the ability to repay a loan, a licensee is required to give "great weight and due consideration" to the Department's guidance document, entitled "Guidance on Nontraditional Mortgage Products Risks." This requirement is vague because it is unclear what qualifies as "great weight and due consideration." Furthermore, given that guidance documents are nonbinding, what will be the ramifications if the Department determines that a licensee failed to meet the standards described in "Guidance on Nontraditional Mortgage Products Risks"?

Subsection (f)(6)

Under this subsection, who decides whether the execution of a document is "improper" and when? What recourse does the licensee have if it is determined that execution of the document is "improper"?

Subsection (g)

A commentator suggested that this subsection should be amended to permit a lender to delay or refuse to fund a loan where fraud or other misrepresentation by the applicant is discovered after the closing but prior to funding. Has the Department considered what could be done by a lender or broker if fraud is discovered in that time frame?

Facsimile Cover Sheet



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INDEPENDENT REGULATORY REVIEW COMMISSION

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To: Robert Lopez
Agency: Department of Banking
Phone: 7-1471
Fax: 3-8427
Date: September 19, 2007
Pages: 5

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Department of Banking's regulation #3-43 (IRRC #2620). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: Judy E Ernest Date: 9/18/07